

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

IN RE)	
)	
BARRERA, ANTHONY R.)	Case No. 98-02092
BARRERA, NANCY ENGER,)	
)	MEMORANDUM OF
DECISION)	
)	and ORDER
)	
Debtors.)	
_____)	

HONORABLE TERRY L. MYERS, U.S. BANKRUPTCY JUDGE

BACKGROUND

This matter comes before the Court upon the application of the standing chapter 13 Trustee, John Krommenhoek ("Trustee") for allowance of an administrative expense. No plan was ever confirmed in this chapter 13 case. The Debtors voluntarily dismissed the case under § 1307(b) and an order of dismissal was entered on March 29, 1999.

The Trustee is not seeking payment of fees or expenses under 28 U.S.C. § 586(e). Rather, the Trustee is asking the Court to allow him an administrative expense for "the actual, necessary costs and expenses of preserving the estate. . . ." § 503(b)(1)(A). Under § 1326(a)(2), the Trustee is authorized to pay all allowed § 503(b) administrative expenses before returning funds received in the unconfirmed chapter 13 case to the Debtor.

DISCUSSION

The Trustee has made no specific showing of entitlement to an administrative expense. The Trustee instead relies upon a “Standing Order”¹ entered by Judge Alfred C. Hagan in 1989, a copy of which is attached to this decision (the “Order”). The Order provides that, in unconfirmed chapter 13 cases which are converted or dismissed, the Trustee shall be allowed an administrative expense equal to the lesser of \$50.00 or 5% of the funds collected.

For the following reasons, I conclude that the Trustee is properly entitled to allowance of an administrative expense in this case, but that this result is neither automatically nor solely due to the existence of the Order.

First, the Order is reflective of an aspect of practice and culture in the District’s bankruptcy system. But, it is not a Local Bankruptcy Rule or General Order of which all parties are presumed to have notice. Nor is it, by its terms, an absolute entitlement. Therefore, allowance is not automatic. Any time a trustee seeks allowance of an administrative expense, whether or not in reliance upon the

¹ This is not one of the “General Orders” promulgated by the Court and accessible to litigants through the Clerk or from the Court’s Internet site.

Order, notice must be given and cause under § 503(b) shown.²

Second, the Order, by its terms, provides for recoupment of expenses without proof only to the lesser of 5% of funds collected or \$50.00. If the 5% calculation yields an amount in excess of \$50.00, the trustee must still establish a record supporting allowance of an administrative expense under § 503(b)(1). This Court construes the sense of Judge Hagan's Order, and the function of its \$50.00 allowance, as providing something like a "no-asset fee" in chapter 7, *i.e.*, a *de minimis* amount to defray ordinary and commonly incurred expenses in failed chapter 13 cases. Above that minimal amount, entitlement must be shown. Of course, an amount equal to 5% of the funds collected may or may not be equivalent to actual costs and expenses of preservation allowable under § 503(b)(1)(A).³

Third, the trustee must make some showing of the nature of services rendered and costs incurred to justify a requested administrative expense. This need not be elaborate and, in some cases, entitlement may be adequately reflected by the record as a whole without additional submissions. However the Trustee should not automatically assume that the bare record will adequately justify the request any more than he should automatically assume that 5% yields a proper or accurate amount.

² The Order itself requires formal application if the amount sought is over \$50.00. The Order does not proscribe notice. Because the trustee seeks to be paid funds which under § 1326(a)(2) would otherwise be payable to the debtor, it is imperative that the debtor and the debtor's attorney always receive actual notice of the trustee's request; in converted cases, the successor chapter 7 trustee would also be entitled to notice. It would appear, however, that general notice to creditors may not be required if the requested administrative expense is less than \$500.00. *See* Rule 2002(a)(6).

³ There is no magic in the 5% figure. The Court would suggest that any purely mathematical formula is inherently arbitrary, and unlikely to render a number always equal (or even close) to actual costs and expenses incurred. There is no necessary correlation between what the debtor pays before dismissal, and the efforts required of the trustee.

The burden is always upon an applicant seeking allowance of an administrative expense to justify the same. For example, debtor's counsel in unconfirmed chapter 13 cases, who seek allowance of their fees⁴ in order that the same can be paid under § 1326(a)(2) before funds are returned to the debtor, are under the same burden. The Trustee is in no different posture in regard to his request for administrative expense treatment.

The Trustee's request in this case is in the amount of \$301.60. That number is driven by a pure mathematical calculation which, the Court has noted, is problematical. However, the Court has reviewed the entirety of this file and concludes, based upon that review, that an administrative expense in the amount of \$300.00 would be justified under all the circumstances.

CONCLUSION AND ORDER

Based upon the foregoing, the Trustee's application is GRANTED and the Trustee is allowed an administrative expense under § 503(b)(1)(A) in the amount of \$300.00. Such funds may be disbursed before return of the balance of other funds in this unconfirmed chapter 13 case to the Debtors under § 1326.

Dated this 7th day of May, 1999.

⁴ Counsel seek their allowance under §§ 330 and 503(b)(2). They must provide clear notice to the debtor (essentially an adverse party by reason of § 1326(a)(2)), the U.S. Trustee and the trustee, as well as their creditors under Rule 2002(a)(6) if applicable.